COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2013-SC-000560-DG
COURT OF APPEALS FILE NO. NO. 2012-CA-000598-MR

SHEILA PATTON, Administratrix of
The Estate of STEPHEN LAWRENCE
PATTON, Deceased — APPELLANT

VS. — APPEAL FROM FLOYD CIRCUIT COURT
ACTION NO. 08-CI-00653

DAVIDA BICKFORD; PAUL FANNING;
RONALD "SONNY" FENTRESS, JEREMY
HALL, ANGELA MULLINS, LYNN HANDSHOE
and GREG NICHOLS — APPELLEES

BRIEF FOR APPELLEES, JEREMY HALL, ANGELA MULLINS, LYNN HANDSHOE and GREG NICHOLS

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CERTIFICATE OF SERVICE

Pursuant to Rule 76.12(5)(6) and Rule 5.03, this is to certify that a true and correct copy of the within Brief for Appellee was duly mailed, postage prepaid, to: Vanessa B. Cantley, Esq., Bahe Cook Cantley & Nefzger PLC; 312 South Fourth Street, Louisville, Kentucky 40202; Michael J. Schmitt, Esq. and Jonathan C. Shaw, Esq; Porter, Schmitt, Banks & Baldwin, P.O. Drawer 1767, Paintsville, Kentucky 41240; Hon. Johnny Ray Harris, Judge, Floyd Circuit Court, Justice Center, 127 S. Lake Drive, Prestonsburg, Kentucky 41653, Mr. Douglas Hall, Clerk, Floyd Circuit Court, 127 S. Lake Drive, Prestonsburg, Kentucky 41653; and ten original copies were sent by U.S. Registered Mail to: Clerk, Supreme Court, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, KY 40601-3415, this 12th day of November, 2014. This is to further certify that the record on appeal was not removed from the Floyd Circuit Court Clerk.

_____
Neal Smith

STATEMENT CONCERNING ORAL ARGUMENT

These Appellees do not believe that oral argument is necessary given the nature of this appeal.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellant Sheila Patton, as Administratrix of the Estate of Stephen Lawrence Patton, Deceased, initially filed this action on June 2, 2008, amended the Complaint on or about July 11, 2008, and again on November 20, 2008. This is a very unfortunate incident involving the deceased, Stephen Lawrence Patton, who, for whatever reason, took his own life on November 28, 2007 in his bedroom at the home of his parents. Stephen had multiple medical and psychological issues, including a protracted history of migraine headaches dating from age 6. Stephen also had stomach issues (H. Pylori) and other psychological issues that were not reported to the Appellees herein until after Stephen's death. For example, there was a suggestion of a diagnosis of agoraphobia, family mental illness issues, and suggested referrals for a psychiatric evaluation of Stephen. The Appellant claims that two Superintendents, the school Principal, the Assistant Principal, and four classroom teachers did not detect any alleged bullying. The undersigned counsel represents the four classroom teachers, whom Appellant alleges were negligent in their supervision of Stephen and other students within the Allen Central Middle School and that the negligence of these Appellees was the cause of Stephen's suicide.

The Appellant, Sheila Patton, maintains that Stephen was well-liked by his classmates and had a good-natured and cheerful personality. These Appellees would agree with that assessment. Stephen was physically precocious for an eighth grader, standing 6'3" tall and weighing about 196 pounds. There is no evidence in the record of Stephen Patton being systematically bullied by other students, as alleged by Appellants. There is no evidence in the record that the Appellees had knowledge of any such alleged

bullying. The Appellant can point to no complaints or reports to any of the Appellees regarding the alleged treatment of Stephen. Nor is there any proof in the record that anyone was aware that this child was suicidal. The Appellant makes these allegations in her Brief without any citation to the record or any reference to any such evidence.

The Appellant states that **after** the death of Stephen that both she and her counsel "interviewed multiple students and adults who provided detailed information about the bullying Stephen was subjected to." The Appellant has failed on multiple occasions to provide any proof of such self-serving statements made and failed to provide any evidentiary proof of what Appellant's counsel had provided to two experts as being alleged sworn testimony in this matter (See Apx. C1 and ROA 551-553, Exhibit 11 to Barbara Coloroso's deposition; See Apx. B1 and ROA 951, Susan Lipkins deposition, p. 120, line 11; Apx. A3 and ROA 604, Barbara Coloroso, p. 201 lines 11-19; see also ROA 528, Motion to Compel).

These Appellees moved for Summary Judgment on September 15, 2001 (ROA 570) and renewed their Motion for Summary Judgment on November 23, 2011 (ROA 1083-1097). After giving the Appellant several opportunities for supplemental proof and briefing (ROA 655, 1071, and 1111), the Floyd Circuit Court entered Summary Judgment on March 15, 2012 in favor of the Defendants on the basis that: (1) suicide was not a foreseeable event, and (2) qualified immunity acted as a bar to Appellant's Complaint. (ROA 1198-1203). The Appellant appealed to the Court of Appeals, which upheld the granting of Summary Judgment in favor of the Appellees on the basis that Stephen Patton's act of suicide cut off any potential liability. The Appellant subsequently filed a Motion for Discretionary Review, which was granted.

FACTS OBTAINED THROUGH DISCOVERY

The Appellant, Sheila Patton, mother of Stephen Patton, testified on July 16, 2009. She acknowledged that Stephen had suffered from migraine headaches from the age of 6. (See Apx. A1 and ROA, included separately, Deposition of Sheila Patton at p. 15). At the time of his unfortunate suicide, Stephen stood 6'3" and weighed approximately 196 pounds. *Id.*, pp. 22-23. She further acknowledged that Stephen had complained to her that he was uncomfortable in school because of the surroundings being too loud and too bright. *Id.*, p. 77. As a matter of fact, Stephen Patton had previously stated to another student that he would rather die than have another migraine headache. (D. Bickford Dep., p.132-133). Importantly, Mrs. Patton had no knowledge of Jeremy Hall, Angela Mullins, Lynn Handshoe or Greg Nichols having any information or knowledge about Stephen having any problems with other students in terms of hazing, bullying, or harassment at school. Mrs. Patton further stated that Stephen missed a lot of school. Yet, she never wondered about his absenteeism prior to November 28, 2007. *Id.*, p. 106. Stephen would complain to his mother that he had a headache or that his stomach hurt and then she would take him home from school early. She was well aware of and knew of the migraine headaches that Stephen suffered from and she testified that she had no reason not to believe that that was the cause of his frequent early departures from school. *Id.*, p. 107. Stephen never owned a handgun. But, he did have handguns in his room and there were other weapons throughout the home. Stephen maintained possession of a 9 mm pistol, loaded in his bedroom, which was the weapon used in his suicide. *Id.*, p. 118.

Mrs. Patton admitted in her testimony that she had advised the Appellee, Lynn Handshoe, that Stephen's doctor thought that he might have agoraphobia and that they were going to go see someone about it. Stephen committed suicide before any opportunity for his mother to arrange for a psychiatric evaluation. *Id.*, p. 132. Dr. Webb, Stephen's family physician, had told Mrs. Patton that he would like for Stephen to undergo a psychiatric exam. *Id.*, p. 133. Mrs. Patton further confirmed that neither she nor her husband had any idea, prior to Stephen's death, that something like this could happen. *Id.*, pp. 91, 148 and 149. Mrs. Patton further stated that she had no knowledge nor was she aware of any incidents of Stephen allegedly being bullied at school until after his death. *Id.*, 34-36. (See excerpts of Sheila Patton deposition attached to Brief of co-Appellees as Apx. A1).

The deposition of Appellee, Lynn Handshoe, was taken on January 18, 2010. Mrs. Handshoe is and was a teacher at Allen Central Middle School during the time that Stephen Patton was a student there. Mrs. Handshoe testified that she never witnessed Stephen Patton being picked on in any way or bullied at ACMS and that she had never been informed that Stephen Patton was picked on in any way or bullied while at ACMS. (See ROA, included separately, deposition of Lynn Handshoe, pp. 23-24). Mrs. Handshoe further testified that she was concerned about Stephen's frequent absenteeism and that she inquired of Stephen, regarding his migraine headaches, if anyone was saying or doing anything to him. His response to Mrs. Handshoe was simply "no". (See deposition of Lynn Handshoe, p. 24).

Despite allegations in the Appellant's Brief that the Appellees, according to Appellant's expert witness, Barbara Coloroso, could not provide a definition for bullying,

each of the Appellees were in fact able to do so when asked. This is a deliberate mischaracterization of the testimony of these Appellees. For example, Lynn Handshoe testified that "bullying is someone who, with intent to hurt, scares or hurts another individual, and it's normally repeatedly." When asked if it would be fair to say that bullying is not just physical, Mrs. Handshoe replied in the affirmative. (See ROA, included separately, deposition of Lynn Handshoe, pp. 52-53).

The Appellee, Jeremy Hall, was likewise asked if he could define bullying. His response was as follows: "I believe it is consistent and persistent behaviors to cause harm to another person." When questioned if that could include physical and mental bullying, Mr. Hall's response was that it could be physical, mental, just doing things or saying things to try to hurt somebody. (See deposition of Jeremy Hall, p. 5).

Again, Appellant's attorney inquired of Angela Mullins during her deposition whether she could define bullying. Mrs. Mullins testified that "bullying is repeated, consistent, persistent actions with the intent to hurt somebody. Either with words or actions, they want to hurt. The intent is there to hurt, and it happens over a period of time". (See deposition of Angela Mullins, p. 17).

Over the course of Greg Nichols's deposition testimony, he was not asked to define bullying and thus there is no such testimony in the record.

The Appellee, Greg Nichols, testified in his deposition that on one occasion he suspected that Stephen might have been bullied as students were returning to his classroom from lunch. Mr. Nichols testified that he saw one of the other students saying something to Stephen and suspected that it might have been something inappropriate. Mr. Nichols then inquired of the other student if he were saying something to Stephen or

picking on him in some way and the student assured Mr. Nichols that he was not picking on Stephen. He advised Mr. Nichols that they were both just having a good time. Mr. Nichols then spoke with Stephen about this incident who advised Mr. Nichols that they were both having fun and assured Mr. Nichols that no one would pick on him or bully him because of his size. (See deposition of Greg Nichols, pp. 61-63).

Plaintiff cites to the Affidavit of Phyllis Smith, as Smith stated that she advised Greg Nichols that Smith was bullied. Greg Nichols denies this. (G. Nichols Dep., p.59-60). Even if same were true, there is no causal connection to the Plaintiff's alleged treatment at school.

The Appellee, Jeremy Hall, testified in his deposition that he never saw anybody jumping on Stephen's back, not in his classroom, nor in the hallway or the lunchroom. Mr. Hall testified that he had no knowledge of Stephen ever being bullied. (See deposition of Jeremy Hall, p. 71).

The Appellee, Lynn Handshoe, had testified in her deposition that no one, to her knowledge, had any information about Stephen being bullied prior to the allegations that began circulating subsequent to the unfortunate suicide. (See deposition of Lynn Handshoe, p. 39).

The Appellee, Angela Mullins, testified in her deposition that she never saw any warning signs which would have led her to believe that Stephen was suicidal. (See deposition of Angela Mullins, pp. 19-20). Mrs. Mullins further testified that she never observed Stephen being picked on nor did she ever hear any rumors or conversation about anyone picking on Stephen. She further testified that she never heard nor saw anyone jumping on Stephen's back, tripping him, pushing him, making fun of his stutter,

making fun of his boots, his height, his facial hair, or calling him stupid. (See deposition of Angela Mullins, pp. 22-25). Plaintiff cites to an Affidavit of Phyllis Smith stating that students made fun of Stephen Patton's' stutter "right in front of teachers." Of course, no teachers are identified. Mrs. Mullins went on to testify that she was "confident" that Stephen Patton was not bullied at Allen Central Middle School. (See deposition of Angela Mullins, p. 38).

As stated in the Brief by the co-Appellees, Fentress, Fanning and Bickford, the Appellant's bullying expert, Barbara Coloroso, testified that she had been provided insufficient information in this matter to prepare a report, form an expert opinion, and that "there's no expert opinion here". (See Apx.A3 and ROA 602-608, deposition excerpts of Coloroso at pp. 200, 246, 281, 320 and 321, attached as Exhibit 3 to Appellees' Memorandum Brief in Support of Summary Judgment). Further, Coloroso testified in her discovery deposition that she relied upon a synopsis of testimony from students and adults that was given to her by Appellant's counsel. This listing was attached to Coloroso's deposition as Exhibit 11 and identified potential witnesses by letters A through Q, along with alleged "testimony". (See also ROA 528, 551 and 1087). Coloroso acknowledged that this was the singular source of information provided to her that contained any alleged testimony demonstrating possible negligence on the part of these Appellees.

As for the testimony of Susan Lipkins, Dr. Lipkins testified as follows:

> A. What I remember is, first of all, I've been told there is testimony that several students admit to observing Stephen being bullied repeatedly from the 6th grade and that the bullying continued to get worse through the 8th grade, and that he was continuously bullied because of his stutter, because of his height and size, his facial hair, the

boots that he wore, that he was a target because he was extremely quiet, I would say shy and introverted, that he wore a hoodie and would often put his head down on the desk, that his lunch was raided on a daily basis, and I assume that he was jumped on and in some way attacked, and that I'm assuming there were other forms of teasing that took place.

Q. Those different instances or warning signs that you mentioned, what documentation are you relying on for that information?

A. That which the attorney, Miss Cantley, will provide.

(See Apx. B1 and ROA, included separately, Deposition of Susan Lipkins, P. 140).

Q. I mean, you don't know, other than what Appellant's counsel has told you, and from the hearsay that was provided by Sheila Patton, the extent of bullying or in fact that he even was bullied, is that true?

A. That is true.

Id., p. 120

Q. All right, now, please I know you've gone through a lot of information. You have been furnished documents and so forth. From what source did you obtain information that Stephen Patton had been the object of bullying for a number of years?

A. From my conversation with Miss Cantley.

Q. Did you ever interview or speak with Sheila Patton, Stephen's mother?

A. No.

Q. Did you ever speak with the father?

A. No.

Q. Did you ever speak with anyone who worked at the school or in the school district?

A. No.

Q. Did you ever speak with any students or adults or anyone who told you or claimed they had witnessed Stephen Patton being bullied?

A. No.

Q. Have you furnished any written statements from students or from adults or anyone that said that Stephen Patton had been subjected to bullying?

A. Only that which was contained in those...Notebooks (depositions).

Id. at pp. 53-55.

It is clear that the Appellant's experts relied upon what they were told by Appellant's counsel, not any testimony or evidence of record. Consequently, these are not "expert" opinions and these opinions are based upon inadmissible hearsay and argument and are of no probative value. The "opinions" are flawed at their very core.

Neither Barbara Coloroso nor Susan Lipkins provided any testimony with regard to an expert opinion suggesting that these four Appellees were negligent in their implementation of the school's bullying policy or that their alleged negligent conduct had any causal relationship to Stephen Patton's suicide. Throughout the deposition testimony of Susan Lipkins, she falls woefully short of describing any conduct on the part of any of these four Appellees as being negligent in their compliance with the school's bullying policy. She offers suggestions as to other ways that she might undertake supervision of the students, but that is obviously an opinion with regard to a discretionary function of supervision. Despite statements of the Appellant in her Brief to the effect that multiple students and adults were interviewed who provided detailed information about bullying

and a systematic failure for years on the part of administrators and teachers to supervise, the record is entirely devoid of any such proof to support Appellant's claims.

The Appellees state that the Findings of Fact, Conclusions of Law, Order and Judgment entered by the Floyd Circuit Court was proper. The Appellees further state that the analysis of the Court of Appeals was proper and that the Court of Appeals correctly found that Stephen Patton's suicide was not a foreseeable event. The Appellees believe that the Court of Appeals erred in finding that qualified official immunity would not otherwise act as a bar to the Appellant's claims.

ARGUMENT

A. ARGUMENTS AND STATEMENTS OF COUNSEL WITHOUT ANY SUBSTANTIVE PROOF OF RECORD IN SUPPORT DOES NOT ESTABLISH AN ISSUE OF MATERIAL FACT.

It is a fundamental principal of trial practice that counsel is allowed great latitude in commenting upon evidence and in drawing reasonable deductions therefrom. See *Arnett v. Dalton*, 257 S.W.2d 585, 587, Ky. 1953. However, argument must be confined to facts shown by competent evidence and should not concern matters outside the record. See *Triplett v. Napier*, 286 S.W.2d 87, 90, Ky. 1955. Here, the record is devoid of any proof to support alleged facts relied upon by Appellant's experts or arguments made in the brief of the Appellant. Further, this Court is not obligated to consider these cursory arguments at all due to a failure to cite to their location in the record. See *Hallis v. Hallis*, 328 S.W.3d 694, 698 (Ky. App. 2010).

In response to a motion for summary judgment, the respondent must present at least some affirmative evidence showing the existence of a genuine issue of material fact. *Haugh v. City of Louisville*, 242 S.W.3d 683 (Ky. App. 2007). Appellant failed to do so

in her response and during the oral arguments in this matter. It is clear that although Appellant represented to the court, to counsel, and to her own experts that she had testimony from seventeen (17) witnesses identified as A through Q, she, in fact, did not. Although Appellant's counsel represented to the court on September 23, 2011 that she had testimony that was claimed as "work product" which would defeat Appellees' motions, she did not. (See VR, 09-23-2011 hearing, 10:24:30-10:26:27 a.m.) The four affidavits attached to Appellant's brief were not obtained until afterwards in October 2011. Appellant's counsel did not have testimony in her possession to defeat Appellees' motions and, as addressed by co-defendants' counsel, the after acquired affidavits obtained did not create an issue of fact. (ROA 1200-1201).

The Court of Appeals noted that the Appellant failed to cite to the record. (Ct. Appeals Opinion, p. 3). However, the Court of Appeals stated that a citation to the record was not crucial, as the case rests on a judgment of law. Certainly, the issue of whether a suicide is an intervening and superseding act which cuts off liability is a legal question. But, the Court must be able to analyze facts in order to properly analyze the qualified immunity issues raised by the Appellees.

B. THE COURT OF APPEALS (AND THE TRIAL COURT) CORRECTLY HELD THAT AS A MATTER OF LAW THE APPELLEES COULD NOT HAVE REASONABLY FORESEEN HARM TO STEPHEN PATTON AND THEREFORE HAD NO DUTY TO PROTECT HIM FROM THE TAKING OF HIS OWN LIFE IN HIS HOME.

It is well established in Kentucky that a public school teacher can be held liable for injuries caused by the negligent supervision of her students. *Williams v. Kentucky Dep't of Educ.*, 113 S.W.3d 145 (Ky. 2003) citing *Yanero v. Davis*, 65 S.W.3d 510

(2001). The 'special relationship' thus formed between a school district and its students imposes an affirmative duty on the district, its faculty, and its administrators to take all reasonable steps to prevent foreseeable harm to its students. *Williams, supra*, at 148. **The affirmative duty mandated exists only if a threat is foreseeable.**

Courts have long been reluctant to recognize suicide as a proximate consequence of a defendant's wrongful act. See, e.g., *Scheffer v. Washington City V.M. & G.S.R.R.*, 105 U.S. 249, 26 L.Ed.1070 (1882). Generally speaking, it has been said, the act of suicide is viewed as "an independent intervening act which the original tortfeasor could not have reasonably [been] expected to foresee." *Stasiof v. Chicago Hoist & Body Co.*, 50 Ill.App.2d 115, 122, 200 N.E.2d 88, 92 (1st Dist. 1964), *aff'd su nom. Little v. Chicago Hoist & Body Co.*, 32 Ill.2d 156, 203 N.E.2d 902 (1965), as quoted in *Jarvis v. Stone*, 517 F.Supp.1173, 1175 (N.D. Ill. 1981).

There are several exceptions to the general rule. Where a person known to be suicidal is placed in the direct care of a jailer or other custodian, for example, and the custodian negligently fails to take appropriate measures to guard against the person's killing himself, the act of self destruction may be found to have been a direct and proximate consequence of the custodian's breach of duty. *Sudderth v. White*, 621 S.W.2d 33 (Ky. App. 1981). The Kentucky Workers' Compensation Act is liberally construed so as to effectuate the beneficent intent of the legislature in enacting it. The suicide of an employee covered by workers' compensation may be compensable if an injury sustained in the course of the worker's employment causes a mental disorder sufficient to impair the workers' normal and rational judgment, where the worker would not have committed

suicide without the mental disorder. *Wells v. Harrell*, 714 S.W.2d 498 (Ky. App. 1986). Of course, negligence is not a consideration under the Workers' Compensation Act.

Outside the workers' compensation area, and beyond the situation where someone with known suicidal tendencies is placed in the care of a custodian who is supposed to guard against suicide, exceptions to the general rule have been recognized where a decedent was delirious or insane and either incapable of realizing the nature of his act or unable to resist an impulse to commit it. Restatement (Second) of Torts § 455; cf. *Jamison v. Sorer Broadcasting Co.*, 511 F.Supp. 1286, 1291 (E.D.Mich. 1981), *aff'd in relevant part and reversed in part on other grounds*, 830 F.2d 194 (6th Cir. 1987), and the authorities there cited. Here, Appellant points to no facts suggesting that the suicide of Stephen Patton came within any such recognized exception. Stephen was not known to be suicidal. As noted by the Court of Appeals, "it does not appear from the record that anyone was aware that Stephen was suicidal, especially considering that his friends and parents were shocked by the tragic accident. (COA Opinion, p. 8-9). Appellant argues that "the Appellees knew bullying could result in suicide, so it was certainly foreseeable." (Appellant Brief, p. 4). This assertion just does not hold water. If Stephen's suicide was not foreseeable to his own mother, there is no reason to suppose that it was foreseeable to the named Appellees. (See Apx. A1 and ROA, included separately, Deposition of Sheila Patton at p. 148).

The trial court correctly held that:

> "As demonstrated by Plaintiff's Notice of Filing (ROA 1113), there is no case in this jurisdiction nor any other jurisdiction holding that a teacher or other individual may be held liable for negligently causing self-inflicted injury or death of a student (or another) outside of the two exceptions to the general rule as previously argued to the Court. Here, the student was not known

> to be suicidal. See *Sudderth v. White*, 621 S.W.2d 33, 35 (Ky. App. 1981). The facts of this case as applied to Stephen's suicide does not fall within any such recognized exception and Plaintiff fails to cite to any legal authority which establishes that suicide (unless the exception applies) is a foreseeable act for which the plaintiff may recover under the laws of this or any other jurisdiction. In fact, one of the three cases cited by Plaintiff in her notice of filing was subsequently overturned by that state's supreme court holding that the teacher and school district were immune from suit. See *Brooks v. Logan (Brooks II)*, 130 Idaho 574, 944 P.2d 709 (1997) (Teacher and school district were immune from liability based on failure to use reasonable care in supervising student, to prevent him from committing suicide).

See Summary Judgment at ROA 1201. Appellees responded to the above cited notice of filing addressing the lack of support concerning the argument that this was a foreseeable event. (See Apx.D and ROA 177-1180).

The Appellant was given an opportunity to provide the trial court with case authority supporting the Appellant's contention that Stephen's suicide was foreseeable to these Appellees, thus stripping these Appellees of their protection of official qualified immunity. At that point, the Appellant submitted only one case with any similarity to the case at bar, that being *Brooks v. Logan, supra*. It is hard to fathom that the Appellant was not aware at that time that the Idaho Supreme Court had reversed the lower court decision and found that the teacher and school district were immune from liability based on failure to use reasonable care in supervising the student to prevent him from committing suicide.

The Court of Appeals Opinion in this matter was sound, wherein it was concluded that Stephen Patton's suicide was an intervening and superseding act that cut off liability, as there was no prior notice to anyone that the child was suicidal. (*See* COA Opinion, p. 9). The Court of Appeals correctly found that the facts of this matter did not meet any of the recognized exceptions under Kentucky law to the general rule. Even if Appellant's

argument is accepted that there may be other "exceptions," the circumstances of this matter do not merit a finding that the suicide was not an intervening and superseding cause.

C. THE COURT OF APPEALS (AND TRIAL COURT) CORRECTLY FOUND THAT STEPHEN'S SUICIDE WAS A SUPERSEDING INTERVENING CAUSE THAT PRECLUDES RECOVERY FROM THE NAMED APPELLEES.

As addressed by the trial court, when a suicide is claimed to be an injury in a negligence action, the issue of foreseeability is analyzed under the rubric of "supervening cause" and the general rule is that a negligent actor is not liable for the victim's decision to take his own life. The suicide is said to be a supervening cause of the victim's loss of his life, breaking the chain of responsibility that would otherwise link the loss to the negligent act. See e.g. *Jutzi-Johnson v. United States*, 263F.3d 753, 755 (7th Cir. 2001); *Scoggins vs. Wal-Mart Stores, Inc.*, 560 N.W.2d 564 (Iowa 1997); *Beul v. ASSE Int'l, Inc.*, 233 F.3d 441, 445-47 (7th Cir. 2000); *McMahon v. St. Croix Falls School District*, 228 Wis.2d 215, 596 N.W.2d 875, 879 (Wis. App. 1999); *Wyke v. Polk County School Board*, 129 F.3d 560, 574-75 (11th Cir. 1997); *Bruzga v. PMR Architects, P.C.*, 141 N.H. 756, 693 A.2d 401 (N.H. 1997); *Edwards v. Tardif*, 240 Conn. 610, 692 A.2d 1266, 1269 (Conn. 1997); *W Page Keeton et al., Prosser and Keeton on the Law of Torts § 44, p. 311 (5th ed. 1984)*. (See Summary Judgment, ROA 1200).

As noted by the Court of Appeals, the custodial duty owed by teachers and administrators to care for students does not extend to their homes. (COA Opinion, p. 9).

As shown above, facts sufficient to constitute an intervening cause "are facts of such 'extraordinary rather than normal,' or 'highly extraordinary,' nature, unforeseeable in character, as to relieve the original wrongdoer of liability to the ultimate victim." *Id.*,

quoting *House v. Kellerman*, 519 S.W.2d 380, 382 (Ky. 1974). "The question of whether an undisputed act or circumstance was or was not a superseding cause is a legal issue for the court to resolve, and not a factual question for the jury". *House v. Kellerman*, 519 S.W.2d at 382. Here, Stephen's suicide is an intervening superseding cause that precludes liability in this matter.

The Appellants citation to the Babbit case, Com. Transp. Cabinet, Dept. of Highways v Babbit, 172 S.W.3d 786 (Ky.2005) and to the case of Pile v. City of Brandenburg, 215 S.W.3d 36 (Ky.2006) do not bring anything to bear in this matter. Kentucky courts still recognize the concept of superseding cause. The Pile Court recognized the concept of superseding cause, but just stated that the conduct at issue was not an intervening or superseding cause. It is submitted that the instant situation is why this concept exists, is recognized, and was followed by the Court of Appeals.

The Appellant states that using the concepts of proximate cause along with intervening and superseding causes would be confusing to a jury. However, the issues of intervening cause and superseding cause are legal issues. These would not be put before the jury. Submitting the issue of why Stephen committed suicide in this matter would be asking the jury to engage in wild speculation.

D. THE ALLEGED CONDUCT OF APPELLEES JEREMY HALL, ANGELA MULLINS, LYNN HANDSHOE AND GREG NICHOLS DID NOT CAUSE STEPHEN PATTON'S SUICIDE.

A causal connection between the alleged negligence and the injury must be established beyond the point of speculation or conjecture. A mere possibility of causation is not enough. To recover damages for personal injury, there must be some competent evidence from which active negligence charged may be fairly and reasonably

inferred to have caused injury. *McKamey v. Louisville & N. Ry. Co.*, 271 S.W.2d 902, Ky. 1954). In negligence actions, evidence merely furnishing basis of conjecture, surmise, or speculation does not establish proximate cause with certitude, sufficient upon which to rest a verdict. *Fitch v. Mayer*, 258 S.W.2d 923, Ky. 1953. Here, there is no direct evidence that this child's suicide was a result of any alleged bullying. There were no suicide notes, statements to others, or any proof to support the allegations made. Jurors will be required to speculate when examining what, if any, causal relationship exists between the incident at issue in this case and Stephen Patton's medical condition. Clearly, such speculation by a jury is not permitted under Kentucky law. See *Perkins v. Hausladen*, 828 S.W. 2d 652 (Ky. 1992).

E. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S FINDING THAT THE CLAIMS AGAINST THE APPELLEES IN THEIR INDIVIDUAL CAPACITIES WERE BARRED BY OPERATION OF THE DOCTRINE OF QUALIFIED OFFICIAL IMMUNITY.

As correctly held by the trial court, when sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. Qualified official immunity applies to the negligent performance by a public officer or employee of: (1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority. See *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). It is established in Kentucky that a public school teacher can be held liable for injuries caused by the negligent supervision of her students. *Williams v. Kentucky Dep't of Educ.*, 113 S.W.3d 145 (Ky. 2003) citing

Yanero v. Davis, 65 S.W.3d 510 (2001). The 'special relationship' thus formed between a school district and its students imposes an affirmative duty on the district, its faculty, and its administrators to take all reasonable steps to prevent foreseeable harm to its students. *Williams, supra*, at 148. In taking "all reasonable steps", the defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. The affirmative duty mandated exists only if a threat is foreseeable.

In *Turner v. Nelson*, 342 S.W.3d 866, 876 (Ky.2011), the Court of Appeals affirmed dismissal of an action based upon qualified official immunity, holding that "the supervision of students is a discretionary act" and cited as published authority *James v. Wilson*, 95 S.W.3d 875, 905 (Ky.App. 2002); *S.S. v. Eastern Kentucky University*, 431 F.Supp.2d 718, 734 (E.D. Ky. 2006); *Flynn v. Blavatt*, 2010 WL 4137478 (Ky. App. 2010). See also *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006) (where the supervision of prisoners during a work release program was held to be discretionary); and *Haney v. Monsky*, 311 S.W. 3d 235, 240 (Ky. 2010) (where the supervision of children during a camp hike was held to be discretionary). See unpublished opinion *Adams v. Dawson*, 2011-CA-000537, WL 344758 (Ky. App., 2012) (supervision of students during class was discretionary)

The Appellant has argued that supervision of students, in the scenario of this case, is a ministerial, as opposed to a discretionary, function. Those cases involve specific policy action requirements as opposed to general supervision of students, as is the case herein. The act of determining whether students are engaged in horseplay, having fun, or if in fact incidents of bullying are taking place must be a discretionary function.

Otherwise, every episode of misconduct throughout the school on a daily basis would be required to be reported and catalogued as a bullying incident. There would be no time for teaching, coaching, counseling or any other functions for the teachers.

The proof in this case revealed that the district had adopted a bullying policy, that a policy was adopted at the school level, that action was taken to educate the students and employees about the policies, that there were remedial steps taken by placing posters, having a bullying box, and presentation of programs geared towards both faculty and staff. The record indicates that the named Appellees did not perform or fail to perform any act or function in any manner that could be construed as negligent.

Appellant points to Affidavits that have been submitted. However, these Affidavits do not indicate what was reported, when were any actions reported, who the alleged bullies were, etc. The Affidavits are speculative statements. Clearly, the teachers utilize their discretion in identifying what events constitute bullying as opposed to horseplay (*i.e.*, peanut butter on the door knob; piggy- backing, etc.).

As the Court of Appeals recently held:

> "KRS 161.180 provides that teachers and administrators have a duty to supervise students on school grounds according to rules enacted by the school board. Enactment of rules is discretionary, thus rendering qualified official immunity to be available as a valid defense for an administration. Yanero v. Davis, 65 S.W.3d at 529. *The manner in which supervision is conducted is also discretionary*".

See Jenkins Ind. Schools et al vs. Doe, et al, 379 S.W.3d 808 (Ky.App. 2012).

The Court of Appeals in this matter stated that the Floyd County School District's anti-bullying policy was required to be enforced by the administrators and the teachers. (COA Opinion, p. 5). The Court of Appeals stated that the duties of the Appellees were

both ministerial and discretionary in nature. In holding that the teachers are not entitled to qualified official immunity, the Court of Appeals examined the Floyd County Schools Student Handbook & Code of Conduct. The Court of Appeals stated that the teachers and the Principal shall promptly resolve complaints of bullying, and that this is a ministerial function. (COA Opinion, p. 7). However, the Court of Appeals did not apply the qualified immunity analysis and, without explanation, held that the trial court improperly granted summary judgment based upon qualified official immunity. There was no analysis of how or whether the Appellees breached any such ministerial duty. The Appellants must show that there was the negligent performance of a ministerial act. The evidence in this matter shows no such breach of any ministerial duty.

The evidence is clear that there were no complaints of bullying to resolve. The Court of Appeals seems to be assuming that 1) there was bullying of Stephen Patton, and 2) that the teachers were aware of any such bullying. There is no reliable proof that there was any such bullying. Even if there were, the teachers had no knowledge of same. Thus, how could the Appellee teachers be charged with the responsibility under the Handbook with resolving complaints which were not even referenced until after the unfortunate suicide of Stephen Patton.

Although tragic, the trial court properly held that the child's suicide was not a foreseeable act for which the Appellant may recover from the Appellees under the laws of this Commonwealth. The claims of the Appellant herein against the named Appellees fail to state a viable negligence claim. Additionally, there was no proof of record that the named individual administrators or teachers failed to supervise or protect the child from a

foreseeable threat. The claims against the individual defendants were properly barred by the trial court by operation of the doctrine of qualified immunity.

F. THE PAUL D. COVERDALE TEACHER PROTECTION ACT OF 2001 ACTS AS A BAR TO THIS MATTER.

The Paul D. Coverdell Teacher Protection Act of 2001 was passed along with the No Child Left Behind as a condition of federal funding under 20 U.S. C. §6731-6738. The purpose of the Act as it started under U.S.C. §6732 is "to provide **teachers**, principals, and other school professionals the tools they need to undertake reasonable action to maintain order, discipline, and an appropriate educational environment." Under 20 U.S.C. §6735, the Act applies to "States that receive funds under this chapter, and *shall* apply to such a State as a condition of receiving such funds". See 20 U.S.C. §6735. 20 U.S.C. §6735 (a) explains that the Act "**preempts the laws of any State to the extent that such laws are inconsistent** with this subpart, except that this subpart shall not preempt any State law that provides additional protection from liability relating to teachers". Previously, state law appeared to provide consistent protection from tort liability relating to teacher and other school employees through the application of qualified immunity.

Under 20 U.S. C. §6736 (a), civil immunity is granted to individual teachers and no teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if:

(1) The teacher was acting within the scope of the teacher's employment or responsibilities to a school or government entity;

(2) The actions of the teacher were carried out in conformity with Federal, State, and local laws (including rules and regulations) in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school;

(3) If appropriate or required, the teacher was properly licensed, certified, or authorized by the appropriate authorities for the activates or practice involved in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the teacher's responsibilities;

(4) The harm was not caused by the willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher; and

(5) The harm was not caused by the teacher operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft , or vessel to --

(A) possess an operator's license; or

(B) maintain insurance.

Under 20 U.S.C. 6736 (d)(1), none of the exceptions to the Act are applicable in the instant matter, as there are no allegations that the actions constitute (a) a crime of violence, or terrorism; (b) involves a sexual offense; (c) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or (d) where the defendant was under the influence of intoxicating drugs or alcohol at the time of the event.

Although not previously addressed by the Kentucky Courts, the actions of the Appellees would seem to meet the federal standard for "Coverdale immunity," as this is a case of simple negligence as opposed to harm "caused by willful or criminal misconduct, gross negligence, reckless misconduct, or conscious, flagrant indifference to the rights or safety of the individual harmed be the teacher". See i.e. Husk v. Clark County School Dist., 281 P. 3d 1183 (Nev. 2009) applying Coverdale immunity upon motion to dismiss claims of simple negligence in supervision); Dydell v Tayor, 332 S.W. 3d 848 (Mo. 2011) (applying Coverdell immunity in a failure to supervise claim where student's neck was sliced open as a result of a knife attack by classmate); M. W. ex rel. T.W. v. Madison County Board of Educ., 262 F. Supp. 2d 737 (E.D. Ky 2003) (Judge Forester explained in footnote analysis that Coverdell defense was not valid due to allegations that individuals were not complaint with state law because the Act does not protect from gross negligence and flagrant indifference to the rights of other).

CONCLUSION

The claims of the Appellant herein against these Appellees are barred by operation of the doctrines of qualified official immunity and due to the fact that the allegations contained in the Complaint are wholly unsupported and fail to state a proper claim of negligence under Kentucky law. Judge Caudill's Findings of Fact, Conclusions of Law, Order and Judgment were proper and based upon sound law. The Court of Appeals likewise undertook a proper and sound analysis in ultimately concluding that the suicide was not a foreseeable event. The Appellees do believe that the Court of Appeals erred in finding that the Appellees were not entitled to qualified official immunity.

It is respectfully requested that this court affirm the judgment of the Floyd Circuit Court.

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